Supreme Court, U.S.
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No. 99-1249

IN THE

Supreme Court of the United States

AT&T CORP. and
MCI WORLDCOM NETWORK SERVICES, INC.,
Petitioners,

v.

CINCINNATI BELL TELEPHONE CO., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BELL ATLANTIC TELEPHONE COMPANIES

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QUESTION PRESENTED

Whether the court of appeals properly held that Section 254 of the Communications Act, which expressly contemplates separate state and federal payment programs designed to promote universal telephone service, cannot be read to authorize federal taxation of intrastate telephone services, in light of the rule of statutory construction set forth in Section 2(b) of the Act, which (with exceptions that do not include Section 254) broadly requires that provisions of the Act be read to avoid federal impositions on intrastate services.

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Respondents Bell Atlantic Telephone Companies—the operating telephone companies of the Bell Atlantic Corporation—oppose the grant of certiorari in this case.[1] The ruling of the Fifth Circuit addresses a purely statutory matter of first impression and has not been deemed worthy of a petition by the Federal Communications Commission. It properly applies Section 2(b) of the Communications Act at the threshold stage of statutory con-

[1] The Bell Atlantic Telephone Companies are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Co., and New England Telephone and Telegraph Co. Pursuant to Rule 29.6, respondents state that they are all wholly owned subsidiaries of Bell Atlantic Corporation.

struction to hold that, unlike other provisions added to the Act in 1996, Section 254 of the Communications Act, whose relevant provisions impose no direct obligations on the providers of intrastate telephone service, does not revolutionize the federal-state allocation of authority so as to allow FCC imposition of obligations, such as taxation, on intrastate services.

STATEMENT

1. In the Communications Act of 1934, Congress established a dual regulatory scheme strongly preserving separate roles for the state and federal governments with respect to the imposition of obligations on common carriers providing telephone service. Section 2(b) of the Act provides:

> nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . .

47 U.S.C. § 152(b). That broad provision, as this Court held in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), "fences off from FCC reach or regulation intrastate matters," unless elsewhere overridden in the Act. Just as importantly, as the term "construed" requires, Section 2(b) states "a rule of statutory construction" governing how other provisions of the Act may be read, requiring an "unambiguous" (or "straightforward") grant of the specific intrastate authority asserted in order to "override the command of" Section 2(b). *Louisiana PSC*, 476 U.S. at 370, 373, 376 n.5, 377.

In the exercise of their presumptively exclusive authority over intrastate telephone service, States historically have pursued policies to encourage maximum availability of telephone service, so-called "universal service." Those

policies have included subsidies. As the Commission told the Fifth Circuit in this case, "[t]he States have provided the vast majority of universal service support." C.A. Brief of FCC at 20. The Commission, for its part, supplemented States' efforts through its authority over interstate services, including its authority over the necessary step of allocating costs to the interstate or intrastate side of the line.[2] Those federal "universal service" programs, while effectively using authority over interstate service to *subsidize* intrastate service, did not impose *obligations* on the provision of intrastate service. The net result of the state and federal efforts, by 1997, was "telephone service at levels associated with very high telephone subscribership rates, currently 94.2%." *Universal Service Order*, ¶ 7.

2. In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress added to the Communications Act a number of provisions that directly imposed obligations on providers of intrastate services. In particular, the provisions that were at issue in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999), impose certain obligations on "each incumbent local exchange carrier" to provide interconnection to "any requesting telecommunications carrier," to make "network elements" available, and to make available at wholesale to resellers "any telecommunications service that the carrier provides at retail" to non-carrier subscribers. 47

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[2] Notably, the Commission provided for certain above-normal allocations of "subscriber loop" and switch costs to be recovered through interstate rates (High Cost and Dial Equipment Minutes Weighting programs), certain interstate "access charge" rates to be available to certain small carriers (Long Term Support program), and certain interstate "subscriber line charges" to be waived for low-income consumers (Lifeline program). *See Report & Order*, Federal-State Joint Bd. on Universal Service (*Universal Service Order*), 12 F.C.C.R. 8776, ¶¶ 208-213, 341 (1997).

U.S.C. § 251(c); *see also id.* § 153(44), (46) (defining terms). It was undisputed in *Iowa Utilities Bd.* that such provisions impose direct obligations on carriers as providers of local services.

Section 254 to the Communications Act, also added by the 1996 Act, is different. This new section provided, for the first time, explicit statutory authority and responsibility for federal universal-service policies to supplement longstanding state authority in the area, recognizing that the spread of competition would require reconsideration of existing policies. As the Commission explained to the Fifth Circuit, however, Section 254 does not make "a radical change in the historic division of support for universal service," but "affirms the fundamental role of the States in promoting universal service." C.A. Brief of FCC at 86, 88-89 (footnote omitted). The section pervasively separates the federal and state roles, authorizing the Commission to create federal spending programs distinct from state programs, and nowhere authorizing the Commission to impose taxes or other obligations on the provision of intrastate services.

Subsection (a) directs the Commission to adopt rules for "*Federal* universal service support mechanisms." § 254(a). Subsection (b), which specifies the governing "principles," provides that "[t]here should be specific, predictable and sufficient *Federal and State* mechanisms to preserve and advance universal service." § 254(b)(5). Subsection (c) provides for a "definition" of "the services that are supported by *Federal* universal support mechanisms." § 254(c)(1). Subsection (d), addressing the source of funding for "the specific, predictable, and sufficient mechanisms established by the Commission," says that payments are to come from "[e]very telecommunications carrier that provides *interstate* telecommunications services." § 254(d). Subsection (e) addresses who may

receive the "specific *Federal* universal service support" created by the Commission. § 254(e). (Emphases added.)

After thus providing for the federal support mechanisms, Section 254 immediately goes on to confirm, rather than displace, the continuing role of the States. Subsection (f) provides that "[a] *State* may adopt regulations . . . to preserve and advance universal service," that "[e]very telecommunications carrier that provides *intrastate* telecommunications services" must contribute "in a manner determined by *the State* to the preservation and advancement of universal service *within that State*," and that "[a] *State* may adopt regulations to provide for additional definitions and standards to preserve and advance universal service *in that State*." § 254(f). The only limitations—directed to state authorities, not carriers—are that intrastate mechanisms adopted by States must not be "inconsistent with" the FCC rules establishing federal mechanisms and that any additional definitions and standards adopted by States must be supported by "specific, predictable, and sufficient mechanisms . . . that do not rely on or burden Federal universal service support mechanisms." § 254(f). (Emphases added.)

3. In 1997, the Commission, carrying out its responsibilities under Section 254(a), began the process of establishing revamped "federal" support mechanisms. *Universal Service Order, supra.* It created several new federal funds to collect and dispense money, both for schools and libraries and for carriers serving especially high-cost areas. Section 254(d) allows the money-collecting levy to be imposed only on a "carrier that provides *interstate* telecommunications services," but the Commission concluded that it could (and for the schools and libraries fund would) impose its levy on revenues from *both* interstate *and* intrastate services for any such carrier (Pet. App.

210a-221a (*Universal Service Order*, ¶¶ 813-23)). The Commission stated that "Section 2(b) . . . is not implicated," because even when the Commission "exercises jurisdiction to assess contributions . . . from intrastate . . . revenues, . . . such an approach does not constitute rate regulation of those services." Pet. App. 218a (*Universal Service Order*, ¶ 821). The Commission added that, even if Section 2(b) is implicated, "section 254 is unambiguous in that *the services to be supported* have intrastate as well as interstate characteristics." Pet. App. 219a (*Universal Service Order*, ¶ 822) (emphasis added).

4. The Fifth Circuit reversed that statutory interpretation. Pet. App. 107a-110a; *see id.* at 44a-54a (also discussing Section 2(b), Section 254, and *Iowa Utilities*). The court concluded first that "the inclusion of intrastate revenues in the calculation of universal service contributions," whether or not it constitutes "rate regulation," is plainly within Section 2(b), because it "easily constitutes a 'charge . . . in connection with intrastate communication service.' " Pet. App. 108a (quote from § 2(b)). The court then concluded that Section 254 does not "reflect enough of an unambiguous grant of authority to overcome the presumption established by § 2(b)." Pet. App. 110a. The court explained that it remains true after *Iowa Utilities*, as it was before (under *Louisiana PSC*), that Section 2(b)'s "rule of statutory construction" governs the threshold task of deciding how, if at all, a provision of the Communications Act "does indeed 'apply' to intrastate matters." Pet. App. 51a.

REASONS FOR DENYING THE PETITION

There is no warrant for this Court to grant the petition, filed by the two dominant long distance carriers. The issue decided by the court of appeals was whether Section 254 must be read in light of Section 2(b) so as not to author-

ize the federal imposition of obligations—specifically, the levying of financial assesments—on the provision of intrastate communications service. The court of appeals' ruling on that question neither conflicts with any other judicial decision (petitioners do not even allege otherwise) nor involves a constitutional issue immune from congressional reevaluation nor presents any other basis for review.

As reflected in the Commission's decision not to file its own petition, review cannot fairly be justified by inflating the practical significance of the ruling. Notably, the limitation of Commission authority at issue here does not present any result like the one this Court characterized as "surpassing strange" and "novel" in *Iowa Utilities*: a fracturing among 50 States of authority to implement specific federal statutory standards governing private conduct. 119 S. Ct. at 730 n.6, 733 n.10. Rather, the Fifth Circuit's decision simply rules out one basis on which the FCC can impose assessments to raise money for its own federal universal-service funds. The Commission has in fact readily altered its fundraising mechanism to conform to the limit. *Sixteenth Order on Reconsideration*, Federal-State Joint Bd. on Universal Service, 17 Comm. Reg. (P&F) 989, 1999 WL 809713.[3] The Fifth Circuit ruling no more warrants this Court's review than any number of other judicial decisions holding particular federal agencies' orders to be inconsistent with their governing statutes.

The Fifth Circuit's ruling is also correct, both in its premise that Section 2(b) applies to the interpretation of Section 254 and in its application of that premise to Section 254. As to the former: Section 2(b) was not itself altered by Congress in 1996, and Congress declared that

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[3] The impact on the private interests of long-distance carriers is no basis for review. In fact, providers of interstate services, taxed neutrally on the extent of those services, can recover the assessments in their rates.

the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." *See* 47 U.S.C. § 152 note (codifying 1996 Act, § 601(c)(1)). More particularly, Congress did not list Section 254 among the Communications Act provisions excepted from Section 2(b).[4] Accordingly, Section 2(b) continues to act, as its language requires and as *Louisiana PSC* held, as a rule of statutory construction at the threshold stage of interpreting the reach of provisions of the Communications Act, including Section 254.

This Court's decision in *Iowa Utilities* is fully in accord with that conclusion. *Iowa Utilities* did not involve the threshold question whether a particular statutory provision imposed certain obligations, or any obligations at all, on the provision of intrastate services: the provisions at issue "unquestionably" did so. 119 S. Ct. at 730 n.6. Thus, unlike this case and unlike *Louisiana PSC*, the *Iowa Utilities* case did not involve an issue about the use of Section 2(b) as a rule of construction. Rather, the Court considered and rejected the distinct argument that, even where provisions do impose obligations on the provision of intrastate services, Section 2(b) also requires an additional unambiguous grant of authority to the Com-

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[4] An amendment of Section 2(b) to exclude from its scope the provision that became Section 254 was part of both the Senate bill (*see* 141 Cong. Rec. H9958 (Oct. 12, 1995)) and the House bill (*see* H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. 127 (1995)). The proposed amendment was deleted in conference, however, and Congress did not enact it.

In *Iowa Utilities*, it was ultimately irrelevant that Congress had chosen not to alter Section 2(b). The Section 2(b) "apply" language was conceded in the case to be overriden by the pertinent substantive provisions, notably those of Section 251—which Section 201(b), the Court held, then expressly authorized the Commission to implement. And this Court interpreted Section 2(b)'s "give the Commission jurisdiction" language not to apply in such circumstances. Thus, no limiting role was left based on Section 2(b).

mission to implement such a provision as it applies to intrastate services. 119 S. Ct. at 730-31. The Court, indeed, noted the distinctness of that issue from the threshold construction issue presented in *Louisiana PSC*. 119 S. Ct. at 731 & nn.7, 8. In short, this Court in *Iowa Utilities* had no occasion to alter and did not alter the "rule of construction" stated by Section 2(b), as made explicit in *Louisiana PSC*.

In applying the Section 2(b) principle here, the Fifth Circuit properly determined, first, that the levying of financial assessments on intrastate services would readily come within Section 2(b)'s broad language. That language plainly is not limited to "rate regulation" or to intrastate "rates"—and so it is irrelevant whether, as the Commission (Pet. App. 218a) and petitioners (Pet. 11) insist, the imposition of financial assessments on intrastate services would not constitute "regulation" of intrastate "rates." If Section 254 authorized a levy whose burden increased with the volume of intrastate services (measured in revenues), it would "apply" to (and the levy would be an exercise of government "jurisdiction with respect to") "*charges*, classifications, practices, *services*, facilities, *or* regulations *for or in connection with* intrastate communications service by wire . . . ." 47 U.S.C. § 152(b) (emphasis added).

The Fifth Circuit also properly determined that, given the applicable Section 2(b) rule of construction, Section 254 does not authorize the Commission's levy on intrastate services. In particular, nothing in any pertinent provision of Section 254 meets the requirement of an unambiguous, straightforward statement imposing or authorizing the imposition of obligations on—and in that sense "applying" to—the provision of intrastate services. To the contrary, the federal-state division preserved by Section 2(b) is bolstered, not undermined, by the per-

vasive and careful separation of federal and state roles under Section 254.

Section 254(d), the provision specifically addressing the funding at issue, is itself naturally read to be limited to levies on interstate services. It authorizes assessment only of a "carrier that provides interstate telecommunications services." Although the Commission read the language to allow assessment of *all* revenues earned by any such carrier, that is not even the most natural reading of the subsection's language, let alone the unambiguous or straightforward meaning. The very inclusion of the "interstate" limitation suggests, instead, that assessments may reach such a carrier only *insofar as* it provides interstate services. That reading, moreover, is powerfully reinforced by Section 254(f), which provides for the *States* to impose assessments on intrastate services, thus indicating conscious avoidance of overlapping federal and state authority to tax the same services. In addition, under the Commission's reading, subsection (d)'s requirement of an "equitable and nondiscriminatory basis" for assessments would easily be flouted: a $10 billion local-service firm that happens to do a tiny amount of interstate business would be hit with a large bill (the whole $10 billion in local revenues could be taxed) while another $10 billion local-service firm that avoids any interstate business would escape the bill entirely.

Other aspects of Section 254 furnish no better authority for imposing intrastate assessments. Section 254(b), in stating the "principles" that should guide federal mechanisms, may embrace the authority to *subsidize*, but such authority is virtually the opposite, not the equivalent, of authority to impose burdens or obligations, whether behavioral or monetary. Indeed, if Section 254(b)'s sweeping statements of guiding principles extended beyond subsidies to impositions, virtually no aspect of local service regulation would be beyond Commission control. No

such revolution of the federal-state allocation of authority was intended or can properly be inferred.

Finally, Section 254 as a whole powerfully reinforces, rather than supercedes, Section 2(b)'s division of authority. The provision pervasively separates the federal and state roles. And Section 254(f), in particular, expressly confirms the preservation of state authority over universal service policies implemented through the exercise of jurisdiction over intrastate services. *See* Pet. App. 53a (Section 254(f) "gives exclusive authority over intrastate contributions to the state commissions"). Certainly it would be "incongruous to use this explicit limitation on FCC authority as the hook to provide it with jurisdiction." *Id.*

In short, the authority claimed by the Commission is not to be found in subsections (d) or (b) and is contrary to Congress's contemplation of separate roles for the federal government and the States, reflected in subsection (f) and in Section 254 more generally. Section 254 cannot be read to overcome Section 2(b) and authorize the levying of federal financial assessments on the provision of intrastate services. The Fifth Circuit's decision so holding is correct. For that reason, and because there is no other reason for review, the decision should not be disturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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